Supreme Court, U.S.
FILED
NOV 20 1986
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CLERK

No. 86-491

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANCIS M. GIANCOLA
AND CHARLES A. PIFER, II, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act (the Act), 31 U.S.C. (& Supp. II) 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring currency transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

2. Whether under the Act and implementing regulations different branches of the same bank constitute a single "financial institution."

3. Whether the trial court's instructions on specific intent were correct.

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OPINION

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 783 F.2d 1549.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1986. A petition for rehearing was denied on July 29, 1986 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on September 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on two counts of conspiracy to defraud the United States, in violation of 18 U.S.C. 371.[1] They were each sentenced to two concurrent five-year terms of imprisonment (Pet. App. 44a-47a).

1. Under federal law, a financial institution is required to file a Currency Transaction Report (CTR) whenever a customer makes a currency deposit in excess of $10,000. 31 U.S.C. 5313; 31 C.F.R. 103.22(a) (1985).[2] The evidence at trial, which was summarized by the court

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[1] Before submitting the case to the jury, the trial court dismissed 20 counts charging violations of 18 U.S.C. 1001 (Pet. 5; Pet. App. 14a-39a).

[2] 31 U.S.C. 5313(a) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

31 C.F.R. 103.22(a) (1985) provides:

> Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary * * * and all information called for in the forms shall be furnished * * *.

Each Currency Transaction Report form contains the following provision (4 R.511):

> * * *Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

of appeals (Pet. App. 2a-3a) and is not in dispute (Pet. 12), showed that on single days in October 1983, and again in June 1984, petitioners used currency to purchase cashier's checks or money orders from separate branches of particular banks. The purchases aggregated to more than $10,000 per bank, although petitioners structured their transactions so that no branch received more than $10,000 in currency on any one day. By structuring the transactions in this fashion, petitioners sought to "prevent[] [the] 'financial institution[s]' from having to file a Currency Transaction Report" (Pet. App. 3a).

2. The court of appeals affirmed by a divided vote (Pet. App. 1a-10a). It held (Pet. App. 4a-7a) that under Section 5313 and the implementing regulations, different branches of the same bank constitute a single "financial institution." The court therefore agreed with the government's contention that "single transactions on the same day, with the same bank, albeit with different branches of the bank * * * do require the bank to file a CTR" (Pet. App. 6a). Thus, the court held that petitioners' conduct in structuring the exchanges by making them in different branches of the same institution and by using false names was sufficient to constitute the crime of conspiracy to defraud the United States (Pet. App. 7a). The court of appeals also concluded that the trial court's instructions on specific intent were not erroneous (*ibid.*).[3]

Judge Hill dissented (Pet. App. 7a-10a). In his view the case was governed by the Eleventh Circuit's previous decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). There, the court of appeals had held that a defendant who makes cash transactions aggregating to more than $10,000, but consummated at different banks, cannot be convicted under Section 5313. Judge Hill concluded

[3] In addition, the court of appeals rejected Fourth and Fifth Amendment challenges to the currency reporting provisions (Pet. App. 7a). These claims are not presented in the petition.

that "a similar rule [applies] where the transactions occurred at different branches of the same bank" (Pet. App. 10a). Suggesting that "the Congress or the Secretary or both ought further to address this problem" (Pet. App. 9a (footnote omitted)), Judge Hill would have reversed the convictions.

ARGUMENT

1. Petitioners first contend (Pet. 6-12) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency reporting requirements. The same claim has been made in a petition now pending before the Court in *Heyman* v. *United States*, No. 86-5365. In our brief in opposition in that case, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[4] Congress, however, has recently enacted the Money Laundering Control Act of 1986, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (Oct. 27, 1986). The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law should deprive the statutory issue presented in the petition of any continuing significance. Accordingly, petitioners' claim, which in any event is meritless even under the former provisions of 31 U.S.C. 5313 *et seq.*, does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTR's in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held liable for causing a financial institution to violate its statutory duties. See,

[4] We have furnished counsel with a copy of our brief in opposition in the *Heyman* case.

e.g., *United States* v. *Heyman*, 794 F.2d 788 (2d Cir. 1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because Section 5313 and the applicable regulations do not themselves impose on third parties a duty to file CTR's, 18 U.S.C. 2(b) cannot be read to impose criminal liability on persons who, by structuring their deposits, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985)[5]; *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986);[6] *United States* v. *Larson*, 796 F.2d 244 (8th Cir.

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[5] In *Anzalone*, the defendant deposited more than $25,000 on a single day at the Haymarket Cooperative Bank. Thereafter, on separate days, he deposited a total of $75,000 more; each of those individual deposits, however, was less than $10,000, and thus no CTR was filed by the bank. The defendant was charged with failing himself to file a CTR and, in addition, with causing the bank to fail to file a CTR. The court of appeals reversed defendant's convictions and dismissed the indictment. Neither Section 5313 nor the applicable regulations, the court held, impose on a bank customer the duty to file a CTR. The court also refused to uphold the defendant's conviction under 18 U.S.C. 2(b). It held (766 F.2d at 683) that the bank "lacked knowledge of the[] 'structured' nature" of the deposits, and was thus innocent of failing to report the deposits. Since the bank was innocent, the court reasoned, the defendant could not be held liable for causing the bank to violate Section 5313.

[6] In *Varbel*, the defendant arranged to have a series of deposits made at different banks and, to some extent, on different days. Although the deposits aggregated to more than $49,000, each deposit was less than $10,000 and thus none of the banks involved filed a CTR for any of the cash transactions. 780 F.2d at 759. The court of appeals held that the language of 31 U.S.C. 5313 as well as the governing regulations makes clear that "only financial institutions are required to file reports" (780 F.2d at 762). Following *Anzalone*, the court held

1986).[7]

Whatever the merit of the decisions from the First, Eighth, and Ninth Circuits in construing Section 5313, Congress has totally revised that statute by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the Eleventh Circuit's decision in *Tobon-Builes*—on which the same court substantially relied in the present case. Section 1354 of the Act, entitled "Structuring Transactions To Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides, in pertinent part, as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial

---

that the defendant could not be held liable under Section 2(b), since the banks were not aware that deposits in excess of $10,000 had been made. The Ninth Circuit has applied its holding in *Varbel* in two subsequent cases. See *United States* v. *Reinis*, 794 F.2d 506 (1986); and *United States* v. *Dela Espriella*, 781 F.2d 1432 (1986).

[7] In *Larson*, the defendant purchased cashier's checks worth a total of $44,500 from a single bank on a single day; each transaction, however, was for less than $10,000 and thus no CTR was filed. Thereafter, again on a single day, the defendant purchased an additional $53,300 in cashier's checks, also by making individual deposits in amounts just under $10,000. Once more, no CTR's were filed by the banks involved. 796 F.2d at 245-246. Following *Anzalone* and *Varbel*, the court held that due process did not permit the government to extend the reporting requirements of Section 5313 to a bank customer. The court also held that since the banks were unaware of the defendant's structured transactions the defendant could not be liable under 18 U.S.C. 2(b).

institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioners did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *Anzalone* and *Varbel*. The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, an earlier version of the money laundering bill, stated (S. Rep. 99-433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit

> Court of Appeals, in *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. 99-746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[8]

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[8] Here, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. 99-746, *supra*, at 18 n.1).

> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[9]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act.

The court of appeals did not address in this case the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *Tobon-Builes*. There, the court of appeals had held that although the duty to file CTR's is imposed only on financial institutions, a third party who causes the

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[9] For this proposition the House Report cited, inter alia, *Anzalone* and *Varbel* (H.R. Rep. 99-746, *supra*, at 19 n.2).

institution to violate its duties may be convicted under 18 U.S.C. 2(b).[10] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly peformed by him or another would be an offense against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[11]

This construction of Section 2(b) applies here as well. Although petitioners' structured deposits prevented various banks from learning of their duty to file CTR's, petitioners' success in that endeavor cannot shield them from liability under Section 2(b), and, in turn, from liability for conspiracy under 18 U.S.C. 371.

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[10] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[11] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of such Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from

2. In passing, petitioners also challenge (Pet. 7, 9) the court of appeals' holding that different branches of the same bank constitute a single "financial institution" under Section 5313. Again, the new Money Laundering Act vitiates any continuing importance of this issue, as do certain proposed regulations recently issued by the Secretary. In any event, the court of appeals correctly resolved this issue under the law as it then existed.

a. By enacting the new money laundering statute, Congress made clear that it intended to prohibit all structured currency transactions intended to evade the reporting requirements—whether consummated at separate branches or even at entirely different banks. The language of the structuring prohibitions, quoted above, is not limited in any way to transactions consummated at a single branch. Moreover, the Senate Judiciary Committee stated (S. Rep. 99-433, *supra*, at 22) that the new "offense of structuring a transaction to evade the reporting requirements" does not even depend on "whether an individual transaction is, itself, reportable." For example, the Committee specified (*ibid.*):

> [A] person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.

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which a false entry by an innocent intermediary necessarily follows" (300 U.S. at 48-49). So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

Accord H.R. Rep. 99-746, *supra*, at 19. Because the structuring prohibitions embrace transactions even at separate banks, they plainly cover transactions at different branches of the same bank. Under the new Money Laundering Act, therefore, the statutory claim addressed by the court of appeals has been dispositively resolved.[12]

b. In addition to the new legislation, the Secretary on August 25, 1986, issued proposed regulations to amend 31 CFR Pt. 103. See 51 Fed. Reg. 30233 (1986). These regulations, for which comments must be received by November 24, 1986, will amend 31 C.F.R. 103.22 by expressly providing that "[a] financial institution includes all of its domestic branch offices." The proposed regulation further deprives the statutory issue raised in the petition of any continuing importance.

c. Even under the law as it then existed, the court of appeals decided this issue correctly. 31 U.S.C. 5312(a)(2)(A) defines a "financial institution" as "an insured bank"—a term that plainly embraces a bank and all of its branches. Accord *United States* v. *Sanchez Vazquez*, 585 F. Supp. 990, 992-993 (N.D.Ga. 1984). To be sure, the regulations implementing Title 31 define "financial institution" to include "[e]ach * * * branch" of a bank. But this regulation simply means that bank branches must file CTR's when they receive more than $10,000 in cash on a given day; it does not relieve the parent bank from its own obligation to file a CTR when its branches,

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[12] In fact, one of the cases that Congress intended to overrule in this new legislation was the Eleventh Circuit's own decision in *Denemark*, holding that currency transactions at separate banks are not covered by Section 5313. See S. Rep. 99-433, *supra*, at 21-22; H.R. Rep. 99-746, *supra*, at 18-19 & n.2. The dissenting judge in the present case believed that petitioners' transactions—at separate branches of the same bank—were governed by *Denemark*, pending some effort by "the Congress or the Secretary * * * to address this problem" (Pet. App. 9a (footnote omitted)). Congress has now done so.

taken together, receive in excess of $10,000 in currency from a single source on a single day. See *Sanchez Vazquez*, 585 F. Supp. at 993. By preventing the parent banks from learning that their branches had received large sums of cash from a single source, and thus causing the parent banks to fail to file CTR's, petitioners conspired to violate the currency reporting laws.

3. Petitioners' challenge (Pet. 12-15) to the trial court's specific intent instructions is frivolous. The court expressly stated that to convict petitioners the jury would have to find that petitioners acted "with the specific intent to do something the law forbids, that is to say, with the purpose either to disobey or disregard the law" (Pet. 13). The court also instructed that "[t]o establish specific intent the evidence must establish beyond a reasonable doubt that the defendant knowingly did an act with a purpose to violate the law" (*ibid.*). Finally, the court added, "the purpose and intent of the defendants in entering into the agreement with each other" must be proved to have been "to interfere with the Treasury Department's function of receiving currency transaction reports from financial institutions" (Pet. 14). These instructions, "viewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)), were plainly sufficient to charge specific intent. See *United States* v. *Haldeman*, 559 F.2d 31, 112-117 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Patrick*, 542 F.2d 381, 388-389 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). See also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 27.05, at 7 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1986

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986 163883 42001